14 (5) 5-5-08

IN THE UNITED STATES SUPREME COURT

Cause No. 07-1052

NATHANIEL QUARTERMAN,

Director, Texas Department of Criminal Justice – Correctional Institutions Division,

Petitioner

v.

FERNANDO GARCIA,

Respondent

On Petition for Writ of Certiorari to the United States Supreme Court from the United States Fifth Circuit Court of Appeals

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BRIEF IN OPPOSITION

Respectfully Submitted by

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QUESTIONS PRESENTED / RESTATED BY RESPONDENT

(Capital case)

1. Whether this Court should address whether ***Penry*** error is subject to harmless-error analysis given that Petitioner waived the issue by not raising it until rehearing before the Court of Appeals, the issue involves a statue which was amended 17 years ago and affects a minuscule number of inmates, the type of error caused by the Texas statute was unique in capital sentencing, and the mitigating evidence that the jury was precluded from considering in this case – that the defendant was repeatedly subjected to sexual assault by family members during his childhood, leaves no doubt that the error was harmful under any standard?

2. Whether this Court should address whether ***Penry*** error is subject to harmless-error review given that the subjective and normative basis of the evidence underlying the jurors reasoned moral judgment in death penalty cases is incompatible with an evaluation of historical fact appropriate for harmless error review, and whether a finding of ***Penry*** error, by virtue of the nature of this evidence, subsumes the issue of harm?

PARTIES TO THE CASE

The parties to this case are Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Institutions Division, who is the petitioner, and Fernando Garcia, the respondent, who is an inmate in the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division.

TABLE OF CONTENTS

Questions Presented / Restated by Respondent. 1

Parties to the Case. ii

Table of Authorities. iv

Jurisdiction. 1

Procedural Statement. 1

Statement of the Case. 2

Reasons to Deny Petition for Writ of Certiorari. 9

I. This Court Has Previously Denied a Petition for Writ of Certiorari On this Same Ground in ***Nelson v. Quarterman***, No. 06-1254 (2007), But Petitioner Has Presented No new Basis to Address the Claim. 10

II. The Issue Before this Court Lacks the Widespread Importance Underlying this Court's Decision to grant a Writ of Certiorari due to the uniqueness of the Texas Death Penalty Statute and Limited Number of Texas Inmates Subject to the Statute. 16

III. A Harmless Error Standard is Inappropriate in the Context of ***Penry*** Error Because The Unique Prejudice from The Deprivation of an Adequate Vehicle to Consider Mitigating Evidence is Impossible to Quantitatively Evaluate In Light of the Jurors' Obligations to Undertake a Reasoned moral Response. 18

IV This Court's Most Recent ***Penry*** Decision in ***Smith v. Texas*** (***Smith II***) Suggests that the Question of Harm From ***Penry*** Error is Subsumed into the Question of Error. 22

Conclusion and Prayer. 26

TABLE OF AUTHORITIES

Case law:

Abdul-Kabir v. Quarterman, 550 U.S. ___, No. 05-11284 (4/24/2007). 9, 10, 11, 16, 20

Adams v. Texas, 448 U.S. 38 (1980). 21

Almanza v. State, 686 S.W.2d 157 (Tex.Cr.App. 1984). 22, 23

Arline v. State, 721 S.W.2d 348 (Tex.Cr.App. 1986). 23

Arizona v. Fulminante, 499 U.S. 279 (1991). 18

Boyde v. California, 494 U.S. 370 (1990). 24

Beck v. Alabama, 447 U.S. 625 (1980). 18

Brecht v. Abrahamson, 507 U.S. 619 (1993). 10, 13, 17, 19

Brewer v. Quarterman, 550 U.S. ___, No. 05 11287 (4/24/2007). 9, 10, 11, 16, 20

Calderon v. Coleman, 525 U.S. 141 (1998) 24

Cordova v. State, 733 S.W.2d 175 (Tex.Cr.App. 1987) 21

Estelle v. Smith, 451 U.S. 454 (1981) 13

Ex parte Hood, 211 S.W.3d 767 (Tex.Cr.App. 2007). 17

Ex parte Smith, 185 S.W.3d 455 (Tex.Cr.App. 2006). 23

Grcia v. Dretke, 3:01-CV - 580 (N.D. Tex -Dallas, Oct. 6, 2003). 2

Garcia v. Quarterman, 456 F.3d 463 (5th Cir. 2006). 2

Garcia v. Quarterman, 03-11097 (5th Cir. 10-15-2007). 2

Garcia v. State, 887 S.W.2d 846 (Tex.Cr.App. 1994). 1

Garcia v. Texas, 115 S.Ct. 1317 (1995). 1

Graham v. Collins, 506 U.S. 461 (1993). 9

Granberry v. Greer, 481 U.S. 129 (1987) 14

Hitchcock v. Dugger, 481 U.S. 393 (1987). 13

In re Kunkle, 398 F.3d 683 5th Cir. 2005). 17

Johnston v. Texas, 509 U.S. 350 (1993). 9

Lam v. Kelchner, 304 F.3d 256 (3d Cir.2002). 15

McFarland v. State, 928 S.W.2d 482 (Tex.Cr.App. 1996) 21

Nelson v. Quarterman, 472 F.3d 287
(5th Cir. 2006). 10, 11, 12, 13, 14, 15, 18, 19, 20, 25

Penry v. Johnston, 532 U.S. 782 (2001). 9, 13, 25

Penry v. Lynaugh, 492 U.S. 302 (1989) . . . . . *passim*

Penry v. State, 178 S. W. 3d 782 (2005). 24

Rose v. Clark, 478 U.S. 570 (1986). 18

Sanders v. Cotton, 398 F.3d 572 (7th Cir. 2005). 15

Signletary v. Smith, 507 U.S. 1048 (1993). 13

Smith v. Texas (*Smith I*); 543 U.S. 37 (2004). 9, 22

Smith v. Texas (*Smith II*), 550 U.S. ___, No. 05-11304 (4/25/2007). 9, 22, 24, 26

State v. Tucker, 315 Or. 321, 845 P.2d 904 (1993). 16

State v. Wagner, 309 Or 5, 786 P2d 93 (1990). 16

Sullivan v. Louisiana, 508 U.S. 275 (1993) 18, 21

Tennard v. Dretke, 542 U.S. 274 (2004). 9

United States v. Cacioppo, 460 F.3d 1012 (8th Cir. 2006). 15

United States v. Gonzalez-Lopez, 548 U.S. 163 (2006) 19

United States v. Vega Molina, 407 F.3d 511 (1st Cir. 2005) 14

Statutes and Rules:

Or. Rev.Stat. 163.150. 16

Fed.R.App.Pro., Local Rule 47.5.4 12

Tex.Code Crim.Pro. Art. 36.19. 23

Tex.Code Crim.Pro. Art. 37.071. . . . . 1, 7, 16

Tex. Penal Code Sec. 19.03(a)(2) 2

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William R Long, "A Tortured Mini-history: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990's" 39 Williamette L. Rev. 1 2003 16

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Fernando Garcia, by and through his attorney Alexander Calhoun, files this Brief in Opposition to the Petition for Writ of Certiorari file by the State of Texas in this case and respectfully requests this Court to decline certiorari review to the United States Fifth Circuit Court of Appeals. The Court of Appeals' unpublished decision correctly applies this Court's ***Penry*** jurisprudence and presents no issue of compelling importance to nationwide capital jurisprudence. The State's Petition for Writ of Certiorari should be denied.

JURISDICTION

The Fifth Circuit issued a decision on panel rehearing in this case on October 15, 2007. ***Garcia v. Quarterman***, 03-11097 (5th Cir. 10-15-2007) (per curiam) (unpublished). This Court therefore possesses jurisdiction under 28 U.S.C. 1254(1).

PROCEDURAL STATEMENT

Mr. Garcia is among a diminishing number of Texas inmates who were convicted of capital murder and sentenced to death under the pre-1991 revisions to the Texas capital sentencing statute, Tex.Code Crim.Pro. Art. 37.071, which this Court found in ***Penry v. Lynaugh***, 492 U.S. 302 (1989), to be constitutionally problematic. He was convicted of capital murder and sentenced to death in Dallas County, Texas on December 9, 1989. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals ("CCA") in a published decision. ***Garcia v. State***, 887 S.W.2d 846 (Tex.Cr.App. 1994). This Court denied his petition for writ of certiorari. ***Garcia v. Texas***, 115 S.Ct. 1317 (1995).

Mr. Garcia pursued state post-conviction relief, and was ultimately denied relief by the CCA on February 28, 2001. ***Ex parte Fernando Garcia***, No. 45,875-01 (Tex.Cr.App. Feb. 28, 2001) (per curium). He subsequently sought federal relief, but was denied by the United States District Court for the Northern District of Texas on October 6, 2003. The Court granted a certificate of appealability, however, on Mr. Garcia's ***Penry*** claim. ***Garcia v. Dretke***, 3:01-CV - 580 (N.D. Tex –Dallas, Oct. 6, 2003).

A panel of the United States Fifth Circuit Court of Appeals, with one dissent, initially denied relief on Mr. Garcia's ***Penry*** claim. ***Garcia v. Quarterman***, 456 F.3d 463 (5th Cir. 2006). In response to Mr. Garcia's petition for En Banc rehearing, however, the panel reversed itself, and granted relief on the ***Penry*** claim in an unpublished, per curiam decision. ***Garcia v. Quarterman***, 03-11097 (5th Cir. 10-15-2007).

Petitioner, the State of Texas, has sought a petition for writ of certiorari.

STATEMENT OF THE CASE

Mr. Garcia was convicted of murder in the course of the commission of aggravated assault. Tex. Penal Code Sec. 19.03(a)(2) (West 1987).

During the punishment phase of trial both the State and Mr. Garcia produced substantial evidence relating to Mr. Garcia's his background, character and circumstances. The State called Dr. Betty Lou Schroeder, a psychologist who had psychologically evaluated Mr. Garcia following his 1981 conviction for sexual abuse of a child.

Dr. Schroeder's records reflected that Mr. Garcia's mother abandoned him at birth and he had been raised by his 81-year old grandmother. The grandmother raised Mr. Garcia and his older brother; living on social security payments. [Vol. 21 RR: 2785].

Mr. Garcia advanced as far as the 10th grade in school before dropping out. [Vol. 21 RR: 2785]. His recorded academic performance reflected he was actually functioning at an elementary or middle school level. [Vol. 21 RR: 2796]. Dr. Schroeder believed that he had likely advanced through school as the result of social promotion. [Vol. 21 RR: 2798].

Mr. Garcia's drug history included the use of marijuana and spray paint. [Vol. 21 RR: 2785]. Dr. Schroeder described the effect of alcohol and spray paint abuse upon the abuser's health, explaining that spray paint in particular "primarily attacks the neurological system" "often" causing permanent damage. [Vol. 21 RR: 2800]. She observed that it was important to determine the extent to whether substance abuse contributed to Mr. Garcia acting upon his sexual drive. [Vol. 21 RR: 2801]. She also expressed her opinion, based upon Mr. Garcia's past recorded behavior while incarcerated, that Mr. Garcia would likely conform to a structured prison environment and would not present a future danger to prison society [Vol. 21 RR: 2806-2807].

Schroeder administered psychological tests to Mr. Garcia, including the Rorschach projective test to determine his perception of reality. Mr. Garcia's response indicated a "very pathological" outlook [Vol. 21 RR: 2789].

Dr. Schroeder believed that Mr. Garcia suffered from pedophilia, which she explained was a "personality disorder" consisting of "maladapted patterns of coping" a 'pathological way that seems to help the person deal with their problems." [Vol. 21 R: 2783, 2789 - 2790]. She explained that Mr. Garcia's "psychiatric/psychological pathology" related directly to a "basic primary human drive[ ] . . . sex" and for that reasons was "very difficult to change." [Vol. 21 RR: 2791]. She agreed with the prosecutor's suggestion that pedophiles were "extremely high risk" to commit similar offenses in the future, despite therapeutic intervention. [Vol. 21 RR. 2791]. She explained that individuals suffering from pedophilia tended to "grow more violent, more heinous as time goes on." [Vol. 21 RR: 2792].

On cross-examination, Dr. Schroeder agreed that Mr. Garcia had experienced a "psychologically deprived" background. [Vol. 21 RR: 2794]. He had had an abnormal childhood marked by the absence of both nurturing and discipline from his parents. [Vol. 21 RR. 2794 - 2995]. In describing Mr. Garcia's background, Schroeder explained that "often times individuals such as this have also been sexually abused as children, or had a great deal of abnormality in that area in their rearing." [Vol. 21 RR. 2794 - 2995].

Dr. Robert Powitzky, a clinical psychologist specializing in sexual abuse, testified on Mr. Garcia's behalf. [Vol. 21 RR: 2863]. Mr. Garcia's reported life history reflected that he had been abandoned by his mother at a very young age and raised by his elderly

grandmother. [21 Vol. RR: 2861]. He grew up on a rough part of San Antonio's west-side. [21 Vol. RR: 2863 - 2864]. In general, Mr. Garcia was neglected by his grandmother, but in the course of raising him, he was exposed to witchcraft and other "bizarre . . . experiences." [21 Vol. RR: 2861].

Dr. Powitzky, like Dr. Schroeder, diagnosed Mr. Garcia as suffering from pedophilia, which was defined as a "personality disorder." [Vol. 21 RR: 2861]. Mr. Garcia reported to Powitzky that had been sexually abused by both males and females from an early age. After she reappearing in Mr. Garcia's life, his mother began to sexually abuse him during periods of visitation. On occasion, Mr. Garcia would be forced to engage in sexual intercourse with his mother and her partners. He was oftentimes intoxicated during this abuse. At the age of five, Mr. Garcia was made to perform fellatio on the friend of an older brother, and at the age of six, he was forced to fellate his older brother. When he was eight years old, Mr. Garcia was sexually abused by a 14-year old cousin, being compelled by her to perform cunnilingus. When Mr. Garcia was in the third grade, he was sexually abused by a nun on several occasions. [Vol. 21 RR: 2861 - 2862].

According to Dr. Powitzky, Mr. Garcia's sexual abuse would have had a particular psychological impact upon his development because of cultural factors growing up in a Hispanic neighborhood in San Antonio. [Vol. 21 RR: 2863 - 2864]. Significantly, Mr. Garcia's childhood sexual abuse could likely have had a formative effect upon Mr.

Garcia's own development of pedophilia. [Vol. 21 RR: 2866]. Dr. Powitzky explained that sexual abuse often results in psychological trauma and resulting issues which are common to most people who have been sexually abused; these issues relate to questions of anger in the abuse victim, a sense of powerlessness, and questions about one's own sexual identity. [Vol. 21 RR: 2866 - 2867]. Dr. Powitzky believed that an individual experiencing "[t]he abandonment, the sexual abuse, the neglect that [Mr. Garcia] suffered . . . would [lead to] some sort of problems in living." [Vol. 21 RR: 2866].

Based upon his experience in treating pedophiles upon his review studies of pedophiles in structured environments, Dr. Powitzky believed that Mr. Garcia would likely not constitute a danger within prison. [Vol. 21 RR: 2870 - 2871]. Mr. Garcia primarily posed a problem of sexually abusing children when he was intoxicated -- substance abuse was clearly a precipitating factor to his behavior. [Vol. 21 RR: 2869, 2871].

Mr. Garcia also presented testimony by, Estella Rangel, who knew Mr. Garcia from the San Antonio housing project where they had lived. Rangel testified that on several occasions, she had observed Mr. Garcia smoking marijuana and sniffing aerosol paint. [Vol. 21 RR: 2852 -2854]. It was after these incidents of pain sniffing, that Mr. Garcia would sexually abuse his step-daughter, leading to his 1981 conviction for sexual abuse. [Vol. 21 RR: 2853].

Mr. Garcia admitted medical records from the Eastern Maine Medical Center in

Bangor, Maine, relating to a suicide attempt by Mr. Garcia on April 21, 1998. The notes and social reports report Mr. Garcia had attempted suicide as a result of depression. [Vol. 21 RR: 2888; XXIIIA].

During the charge conference, Mr. Garcia objected to the jury charge, requesting a "fourth special issue" on the ground that the evidence presented at trial fell outside the statutory punishment issues. [Vol. 23 RR: 2890 - 2891]. The trial court denied Mr. Garcia's request. [Vol. 23 RR: 2895]. The trial court submitted two statutory punishment issues pursuant to Tex.Code Crim.Pro. Art. 37.071(b)(1) & (2) as well as a "nullification instruction." [Clerk's Record ("CR"). 199 - 201; Vol. 21 R: 2898]

During closing argument, the prosecutor urged the jurors to "follow the law" by answering the special punishment issues consistent with their view of the evidence as fit within the punishment issues:

> [Y]ou told us you that you would follow that law. And third, you told us -- and, in essence, you told Ms. Little, you told Mr. Beach, and you told myself that, if you people bring the kind of evidence that convinces me the answer is yes, I'll answer the questions yes. Folks, let me tell you something, whenever you told us that, if you had answered very faintly or if you hesitated in that answer in any way, it was my job to make sure that you did not make one of the 12 jurors in this case. You told us very clearly and very emphatically that, if you people right here bring the kind of case that convinces me that those questions should be answered yes, I'll answer those questions yes.

[Vol. 21 RR: 2902 - 2903].

And throughout the prosecutor's closing argument, he argued that the evidence

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presented at trial compelled an affirmative answer on both punishment issues. [Vol. 21 RR: 2903 - 2912].

Mr. Garcia's defense counsel, constrained by the special issues argued to the jury the relevance of Mr. Garcia's mitigation evidence largely within the confines of the special issues themselves, attempting to convince the jury that Mr. Garcia would not pose a future danger because he would be incarcerated, and that he had not acted deliberately. [Vol. 21 RR: 2916 - 2917]. Counsel conceded that the jurors were obligated by their oaths to answer *honestly* the questions posed by the special issues according to the evidence presented. [Vol. 21 RR: 2914]. But despite these limitations, counsel nonetheless attempted to convey the fact that Mr. Garcia's background bore some mitigating relevance apart from the mere questions posed by the special issues:

> We value live. We value all human life. You people especially value life. . . If Fernando Garcia collapsed with a heart attack at this instant, you would not stand up and gloat. You would not say "Die, Fernando, die, die"
>
> * * *
>
> I ask no sympathy for Fernando Garcia. Fernando lost all right to our sympathy when he went from being a victim to a predator. When Fernando crossed that line, I do not know. It's nowhere in the evidence. Two psychologists can't tell you, but he crossed that line. We unfortunately, as lawyers, cannot bring you evidence as to when that line was crossed.
>
> We cannot bring you Fernando's father to tell you that my only fatherly act began at conception and ended at conception. We cannot bring you his mother whose only motherly love ended at birth.

> What do we have ? What is the sum total we can bring you about this man? . . . We do not have the luxury of having any exhibits showing when Fernando was victimized. What did the neglect, the abuse, the indifference, the poverty and the hate turn Fernando Garcia from a victim to a predator? Only you can use that in guiding your verdict and your answers to the special issues.

[Vol. 21 RR: 2915, 2920 - 2921].

Limited, as it was by the special punishment issues, and confronted with the trial court's *ad hoc* nullification instruction, the jurors returned affirmative responses to the deliberateness and future dangerousness punishment issues, resulting in the trial court imposing a sentence of death. [Vol. 21 RR: 2936 - 2937].

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

When the ink was barely dry on this Court's decision in ***Penry v. Lynaugh***, Mr. Garcia requested, but was denied, a specific instruction permitting the jurors in his trial to consider his mitigation evidence apart from its relevance to the special issues – "deliberateness" and "future dangerousness." Today, after nineteen years and nine *Penry*[1] decisions, the State of Texas finally concedes that the instructions in Mr. Garcia's punishment charge did indeed violate the Eighth Amendment. *Petitioner's Brief*, p.32. However, the State now contends that despite the absence of an adequate vehicle to give full effect to Mr. Garcia's evidence of extensive childhood sexual abuse, of his abandonment by

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[1] These are: ***Penry v. Lynaugh***, 492 U.S. 302 (1989); ***Graham v. Collins***, 506 U.S. 461 (1993); ***Johnston v. Texas***, 509 U.S. 350 (1993); ***Penry v. Johnston***, 532 U.S. 782 (2001); ***Tennard v. Dretke***, 542 U.S. 274 (2004); ***Smith v. Texas (Smith I)***, 543 U.S. 37 (2004); ***Abdul-Kabir v. Quarterman***, 550 U.S. ___, No. 05-11284 (4/24/2007); *and*, ***Brewer v. Quarterman***, 550 U.S. ___, No. 05-11287 (4/24/2007); ***Smith v. Texas (Smith II)***, 550 U.S. ___, No. 05-11304 (4/25/2007).

his parents, of the emotional neglect he experienced from his elderly caretaker, of his impoverishment, of the severe psychological disorder arising from his own childhood sexual victimization, of his chronic drug and alcohol dependency, and his intoxication at the time of the offense, of his depression and suicide attempt, all this evidence is subject to a harmless error analysis under ***Brecht v. Abrahamson***, 507 U.S. 619 (1993), and asks this Court to adopt this new spin to its ***Penry*** jurisprudence. *See, Petitioner's Brief*, p. 23. For the reasons below, Mr. Garcia would contend that certiorari is unwarranted and should be denied.

I. THIS COURT HAS PREVIOUSLY DENIED A PETITION FOR WRIT OF CERTIORARI ON THIS SAME GROUND IN ***NELSON V. QUARTERMAN***, NO. 06-1254 (2007), BUT PETITIONER HAS PRESENTED NO NEW BASIS TO ADDRESS CLAIM.

Through seeking a writ of certiorari on Mr. Garcia's unpublished panel opinion, Petitioner is essentially asking this Court to re-consider its denial of certiorari nine months ago on the Fifth Circuit Court of Appeals' En Banc decision in ***Nelson v. Quarterman***, 472 F.3d 287 (5th Cir. 2006). *See*, ***Nelson v. Quarterman***, 551 U.S. ___, 06-1254 (June 18, 2007) (Order denying certiorari).

In ***Nelson***, the En Banc Fifth Circuit granted rehearing on its earlier panel decision following this Court's certiorari grants in ***Abdul-Kabir v. Quarterman***, 550 U.S. ___, No. 05-11284 (4/24/2007), *and*, ***Brewer v. Quarterman***, 550 U.S. ___, No. 05-11287 (4/24/2007), and reversing its earlier denial of relief based on the Circuit's own application of ***Penry*** jurisprudence, acknowledged that this Court's ***Penry*** jurisprudence requires jurors

be able to give *full* consideration and effect to the mitigation evidence presented at trial. ***Nelson***, 472 F.3d at 316. Concluding that the panel decision had violated this Court's ***Penry*** jurisprudence, the *En Banc* Court remanded the case for a new punishment trial. The Court did so without conducting a separate harm analysis, expressly rejecting the harmless-error standard from ***Brecht v. Abrahamson*** to ***Penry*** error. ***Nelson***, 472 F.3d at 314 - 315.

The State of Texas subsequently sought a petition for writ of certiorari challenging, *inter alia*, the Fifth Circuit's rejection of a harmless error standard under ***Penry***. *See*, ***Quarterman v. Nelson***, No. 06-1254, Petition for Writ of Certiorari, pp. 27 - 30. The State's challenge to ***Nelson*** was pending at the same time this Court was deciding ***Abdul-Kabir*** and ***Brewer***, and the Court was clearly cognizant of ***Nelson*** and its import in the context of ***Abdul-Kabir*** and ***Brewer***. During oral argument, counsel for Abdul-Kabir and Brewer proposed vacating those cases in light of ***Nelson*** and members of this Court noted the State's assurances that it would seek certiorari in ***Nelson***. *See*, ***Abdul-Kabir v. Quarterman***, No. 05-11284, and ***Brewer v. Quarterman***, 05-11287: Transcript of Oral Argument, at 5, 7 (January 17, 2007). Certainly, this Court would not have mistaken the topicality of ***Nelson***'s harmless error ruling during the Court's own consideration of ***Abdul-Kabir*** and ***Brewer***, and file filing of a certiorari petition concurrent with these latter two cases provided this Court a prime opportunity to conclusively resolve this issue, had the Court concluded that the issue had any lingering import to the Court's ***Penry*** jurisprudence. Nevertheless, two months after this Court's decisions in ***Abdul-Kabir*** and ***Brewer*** it denied

certiorari in ***Nelson***. *See*, ***Nelson v. Quarterman***, 551 U.S. ___, 06-1254 (June 18, 2007)(Order denying certiorari). There were no dissents within this Court to the denial of certiorari, despite ***Nelson***'s governing rule – complete with the rejection of a separate harm analysis – to the Fifth Circuit's application of ***Penry***.

Petitioner now seeks to raise this same issue which this Court so recently determined to be unworthy of certiorari. But there is nothing about Mr. Garcia's case – an unpublished, *per curiam* decision – which would merit a grant of certiorari. Because it is unpublished, the precedential value of Mr. Garcia's case is marginal under the Fifth Circuit's local rules. *See*, Fed.R.App.Pro. Local Rule 47.5.4 ("Unpublished opinions issued on or after January 1, 1996 are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case .... An unpublished opinion may, however, be persuasive."). Even assuming arguendo that the panel's resolution of Mr. Garcia's ***Penry*** claim without a ***Brecht*** harmless error analysis was erroneous, the decision has neither nationwide or even circuit-wide importance; it is not binding upon the Fifth Circuit as a whole, nor even upon other Fifth Circuit panels or lower courts. The decision in Mr. Garcia's applies to no one other than Mr. Garcia himself.

Petitioner has provided no compelling basis for this Court to revisit its recent denial of certiorari on this issue. Petitioner cites no intervening decisions by this Court which question the Fifth Circuit's holding in ***Nelson***. Indeed, Petitioner raises fundamentally the same argument in this case as it did in ***Nelson***. *See and compare*, ***Quarterman v. Nelson***,

No. 06-1254 Petition for Writ of Certiorari, pp. 27 - 30, with ***Quarterman v. Garcia***, No.07-1052, Petition for Writ of Certiorari, pp. 23 - 30. Petitioner has cited no specific portion of this Court's ***Penry*** jurisprudence indicating that a separate harm analysis is required, or even appropriate under ***Penry***.[2] To be sure, the ***Penry II*** decision suggests precisely the opposite, that a separate harm analysis is not appropriate upon a finding of ***Penry*** error. In ***Penry II***, while reversing John Paul Penry's death sentence a second time for ***Penry*** error, this Court also addressed a separate ***Estelle v. Smith***, 451 U.S. 454 (1981) error in the petition, but concluded the error was harmless under ***Brecht***. ***Penry II***, 532 U.S. at 796. This Court's contrast in treatment of these to errors is telling in the present case. Petitioner neither acknowledges ***Penry II***, nor presents any recent ***Penry*** jurisprudence indicating that ***Penry II*** is inconsistent with this Court's previous or subsequent ***Penry*** decisions. ***Penry II*** was not lost on the Fifth Circuit, however; in ***Nelson*** the Fifth Circuit expressly cited to this Court's ***Penry II*** decision as partial confirmation of its rejection of a separate harm analysis for ***Penry*** error. ***Nelson***, 472 F.3d at 314.

In addition to the lack of merit to Petitioner's grounds for certiorari, this Court is presented with an equally weighty procedural impediment to granting certiorari: Petitioner's

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[2] Petitioner suggests that this Court's decision in ***Hitchcock v. Dugger***, 481 U.S. 393 (1987), and summary remand in ***Signletary v. Smith***, 507 U.S. 1048 (1993), suggests that ***Penry*** error *can* be subject to harmless error. *Petitioner's Brief*, at 28. Petitioner reads more into these cases, however, than the cases provide. In ***Hitchcock***, this Court noted that the State had never made any attempt to argue harmless error, and therefore did not address the issue. ***Id.***, at 399. The Court's resolution of ***Hitchcock***, and its GVR in ***Smith*** does not establish the proposition on which Petitioner seeks to rely.

11th hour presentation of the harmless error defense before the Court of Appeals. Despite extensive litigation of Mr. Garcia's ***Penry*** claim in state and federal court, both on direct appeal from his conviction and in post-conviction proceedings, Petitioner failed to raise a harmless error argument until it raised the defense in a Supplemental Brief before the Court of Appeals on rehearing, 13 years into the litigation in this case. *See*, ***Garcia v. Quarterman***, 03-1109, Supplemental Brief of Respondent, p. 7 - 13. And even at this point, Petitioner's briefing on the issue was cursory, and devoid of any discussion of the specific evidence presented in this case. As such, it provided the court of appeals no basis to determine how the denial of a proper vehicle to consider Mr. Garcia's mitigation might have been harmless. It was certainly not incumbent for the Court of Appeals in this case to determine without Petitioner's guidance why the jurors' preclusion from giving effect to Mr. Garcia's mitigation evidence might have been harmless. *See*, ***United States v. Vega Molina***, 407 F.3d 511, 524 (1st Cir. 2005) (Court declined to consider harmlessness of error in light of Government failure to brief issue, commenting "we choose not to do the government's homework.").

This Court has been critical of litigants withholding a defense until late in the proceedings. ***Granberry v. Greer***, 481 U.S. 129, 132 (1987) ("We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" in this case, the proceeding in the District Court — is over."). The federal courts have routinely held that the harmless error defense is subject to waiver if not timely and

properly presented. *See*, ***United States v. Cacioppo***, 460 F.3d 1012, 1025 - 1026 (8th Cir. 2006) ("the Government did not argue that the alleged instructional error was harmless, and the failure to do so waives any right to such review"); ***Sanders v. Cotton***, 398 F.3d 572, 582 (7th Cir. 2005) ("The Respondent also argues that any error in the jury instructions was harmless . . . . However, the Respondent did not make this argument in the district court, so it is waived."); ***Lam v. Kelchner***, 304 F.3d 256, 269 (3d Cir.2002) ("The first flaw in the Commonwealth's harmless error argument is that it was never raised before the District Court and was therefore waived."); *and*, ***Nelson***, 473 F.3d at 316 - 317 (Dennis, J., concurring op) (" I am now convinced that the state waived any argument concerning harmless error by failing to raise it in the district court."). *See also*, 2 R. Hertz & J. Liebman, Fed. Habeas Corpus Pract. & Proc., § 31.2, at 1373 - 1374 & n. 1 (4th ed.2001) ("Like other habeas corpus relief, the "harmless error" obstacle does not arise until the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense. Indeed, the "harmless error rule is particularly susceptible to the types of abuse that have led the Supreme Court to call for strict application of waiver rules to the state in habeas corpus proceedings."). Petitioner's delay in raising its harmless error defense until rehearing places Mr. Garcia's case in the same procedural posture as that in ***Nelson***, 473 F.3d at 314, 316 - 317. As such, Petitioner waived any harmless error defense for further review by raising it too late in the proceedings. This Court should not excuse Petitioner's thirteen year delay in raising its defense until the twilight of this litigation.

II. THE ISSUE BEFORE THIS COURT LACKS THE WIDESPREAD IMPORTANCE UNDERLYING THIS COURT'S DECISION TO GRANT A WRIT OF CERTIORARI DUE TO THE UNIQUENESS OF THE TEXAS DEATH PENALTY STATUTE AND LIMITED NUMBER OF TEXAS INMATES SUBJECT TO THE STATUTE.

Certainly, in this Court's decision whether to allocate its scare judicial resources to a writ of certiorari, the widespread applicability of the Court's ruling is of paramount concern. In the present case, the Court is being called to address an issue of rapidly dwindling importance since the issue focuses primarily upon the *sui generis* Texas death penalty statute, Tex.Code Crim.Pro. Art. 37.071. This statute is unlike any other State's death penalty statute, save one,[1] and therefore, the issue at hand would not, as a general matter, affect death penalty jurisprudence outside of Texas itself.

The impact of this Court's decision will be further limited within Texas, however, as a result of the Texas Legislature's amendment to the statue under which Mr. Garcia's death sentence was assessed. In 1991, in response to this Court's ***Penry*** decision, the Texas Legislature amended Art. 37.071 to include the type of instruction mandated by ***Penry***. In contrast to the inmates sentenced under the pre-amended statute, Art .37.071, Sec. 2(c), provides for a distinct special punishment issue directing jurors to consider all mitigation

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[1] Oregon's death penalty statute, Or. Rev.Stat. 163.150, is worded similarly to Texas's death penalty statute, but in contrast to the State of Texas, Oregon courts recognized early-on after ***Penry I*** the necessity of providing a broadly worded mitigation instruction. *See*, ***State v. Tucker***, 315 Or. 321, 332, 845 P.2d 904 (1993); ***State v. Wagner***, 309 Or 5, 786 P2d 93 (1990). In fact, each Oregon death sentence imposed prior to 1991 was reversed on the basis of this Court's ***Penry*** decision. *See*, William r. Long, "A Tortured Mini-history: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990's 39 Williamette L. Rev. 1, 5 (2003). Oregon's early and consistent recognition of the breadth of ***Penry*** removes Oregon's death penalty jurisprudence from the Court's concerns in whether a grant of certiorari will have widespread application outside of Texas.

evidence independent from the other (aggravating) punishment issue. *See*, Tex.Leg. Acts 1991, ch. 838, § 1, p. 2899, eff. Sept. 1, 1991. Due to the 17-year passage of time since the statutory amendment, a decision by this Court would have limited applicability to pre 1991 death sentenced Texas inmates simply due to attrition. During oral argument before this Court in ***Abdul-Kabir*** and ***Brewer***, the State of Texas advised the Court that there are only an estimated 47 inmates remaining on Texas' death row who were tried under the pre-1991 statute. *See*, ***Abdul-Kabir v. Quarterman***, No. 05-11284, and ***Brewer v. Quarterman***, 05-11287: Transcript of Oral Argument, at 43 (January 17, 2007). Of this number, only 25 cases appear to be in active litigation in state or federal court, another nine having completed federal proceedings by the time of oral argument. ***Ibid***. It is unclear among these remaining 25 active cases which ones would even merit ***Penry*** relief. To put this small number in context, as of the filing of this brief in opposition, there are 369 inmates on Texas' death row. *See*, http://www.tdcj .state.tx.us /stat/ offendersondrow.htm. Clearly, the total number of Texas inmates who could possibly be affected by any decision of this Court is quite small.[4]

Simply stated, this Court's decision to grant certiorari in this case would apply only

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[4] Even among this small group, there is unlikely to be a flurry of new litigation among the current inmates tried under the pre-1991 statute whose cases are complete. The Texas Court of Criminal appeals has concluded that Texas' statutory "abuse of the writ" doctrine will sometimes bar litigation of ***Penry*** claims not previously raised. *See*, ***Ex parte Hood***, 211 S.W.3d 767 (Tex.Cr.App. 2007). The Fifth Circuit has similarly concluded that inmates sentenced under the pre-1991 statute who did not present the issue in an earlier federal proceedings are precluded from doing so in a successive writ proceeding. ***In re Kunkle***, 398 F.3d 683, 684 -685 (5th Cir. 2005). Thus, the potential group of petitioners affected by a decision would be quite small, indeed.

to a few dozen inmates at most, who were tried under a statute amended nearly two decades ago. A decision on this case would have no nationwide impact, and little state-wide impact.

III. A HARMLESS ERROR STANDARD IS INAPPROPRIATE IN THE CONTEXT OF *PENRY* ERROR BECAUSE THE UNIQUE PREJUDICE FROM THE DEPRIVATION OF AN ADEQUATE VEHICLE TO CONSIDER MITIGATING EVIDENCE IS IMPOSSIBLE TO QUANTITATIVELY EVALUATE IN LIGHT OF THE JURORS' OBLIGATIONS TO UNDERTAKE A REASONED MORAL RESPONSE.

Although Petitioner contends ***Penry*** error is simply "garden variety trial error" subject to a harmless error analysis under ***Brecht***, *Petitioner's Brief*, p. 26, Petitioner misperceives the nature of ***Penry*** error. The nature of error appropriate for a ***Brecht***'s harm analysis are those types of errors which may be quantitatively assessed, ***Arizona v. Fulminante***, 499 U.S. 279, 307 - 308 (1991), and there are several types of error which, due to their nature of lending themselves to an objective assessment of historical fact, are amenable to a harmless error review. The effect of the admission of an illegally obtained confession, for example, ***Fulminante***, or even the effect of an erroneous jury charge on the burden of proof for a statutory *presumption*, ***Rose v. Clark***, 478 U.S. 570 (1986), are all questions of fact which may be analyzed in context of the other evidence presented at trial to determine the *probable* effect upon the jurors' decision-making process. But certain errors, even ones relating to how jurors could have considered evidence adduced at trail, cannot be quantitatively measured, *see*, e.g., ***Sullivan v. Louisiana***, 508 U.S. 275 (1993) (erroneous instruction on reasonable doubt); ***and***, ***Beck v. Alabama***, 447 U.S. 625, 642 (1980) (denial of instruction on lesser-included offense). Errors which are not subject to quantitative measurement are

immune from a harm analysis. *See*, ***United States v. Gonzalez-Lopez***, 548 U.S. 163 (2006) (explaining that errors deemed "structural" and not subject to harm analysis are those which are ""are necessarily unquantifiable and indeterminate.").

The nature of ***Penry*** error is broader than the "garden variety trial error" which Petitioner contends it to be. *Petitioner's Brief*, p. 26. The jury's preclusion of giving full effect to the Mr. Garcia's mitigation evidence – in contrast to questions of historical fact – defies a quantitative analysis of the evidence precisely because the jurors' role in ***Penry*** to make an amorphous moral judgment call. The ***Nelson*** Court correctly concluded as much in its rejection of a ***Brecht*** analysis, explaining that jurors evaluation in ***Penry*** is particularly unsuitable to a quantitative measure by an appellate court:

> This reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues. It also differs from those at issue in cases involving defective jury instructions in which the Court has found harmless-error review to be appropriate. . . . . Given that the entire premise of the Penry line of cases rests on the possibility that the jury's reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.
>
> Therefore, given the Supreme Court's refusal to allow an appellate court to substitute its own moral judgment for a moral judgment that the jury was unable to make in a Penry case, we decline to do so now.

Nelson, 274 F.3d at 315 (emphasis added)(citations omitted).

In a concurring decision, Judge Dennis, who had previously approved of a separate harm analysis under ***Brecht*** in his concurring panel decision, reversed himself and

specifically rejected his prior reasoning, explaining that ***Penry*** error it is not subject to quantitative assessment in the context of the evidence presented at trial: "a *Penry I* violation is not a 'trial error' because it is impossible for a reviewing court to 'quantitatively' assess what affect the mitigating evidence would have had on the sentencing jury if it had not been granted the discretion to choose between a life or a death sentence . . ."). ***Nelson***, 472 F.3d at 335 - 336.

While vigorously disagreeing with the En Banc Court's ***Penry*** analysis, and despite the specific discussion of the inappropriateness of harmless error standard by both the majority and concurrence, none of the dissenters disagreed with the Court's conclusion that a harmless error analysis was appropriate to ***Penry*** error. *See*, ***Nelson***, 472 F.3d at 337 - 348 (Dissenting Op.of Jones, C.J, joined by Jolly, Smith, Barksdale, Garza and Clement); ***id.***, at 348 - 351 (Dissenting op. of Smith, J.); ***id.***, at 351 - 353 (Dissenting op. of Clement, joined by Jones, Jolly, Smith, Barksdale and Garza); *and*, ***id.***, at 353 - 362 (Dissenting op. of Owen, Jolly and Smith).

And as this Court recently reiterated, a quantitative assessment of the mitigating value of a defendant's mitigation evidence and how it might have persuaded a jury is incompatible with a ***Penry*** analysis. *See*, ***Brewer***, 550 U.S. at ___, slip op. at 7 ("Nowhere in our Penry line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability."); *and*, ***Abdul-Kabir***, 550 U.S. at ___, slip op. at 24 (rejecting lower court's

conclusion that ***Penry*** violation did not occur because "even though Cole's mitigating evidence may not have been as persuasive as Penry's, it was relevant to the question of Cole's moral culpability for precisely the same reason as Penry's.").

Even a cursory review or Mr. Garcia's mitigation evidence demonstrates its lack of susceptibility to a quantitative evaluation of how jurors, had they been permitted to give effect to Mr. Garcia's mitigating evidence, might have done so. Mr. Garcia's history of repeated sexual victimization as a child, his resulting psychological disorder, his parental abandonment and childhood poverty, the emotional neglect experienced as a child, his prolonged substance abuse, even his depression and suicide attempt – all defy quantification since the evidence in question is not merely one of historical fact and how it fits in relation to other evidence presented at trial. Rather, such evidence goes to the core of the jurors inherently subjective, value-driven decision making in the context of an individualized sentencing decision: whether each juror finds such evidence to be mitigating, and if so, whether such evidence is sufficient, if mitigating, is sufficiently so to merit a life sentence despite the jurors' findings on the aggravating evidence. *See*, ***Cordova v. State***, 733 S.W.2d 175, 189 (Tex.Cr.App. 1987) ("The amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to "the range of judgment and discretion" exercised by each juror. . . . Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.") (*quoting* ***Adams v. Texas***, 448 U.S. 38, 46 (1980)); *and*, ***McFarland v.***

State, 928 S.W.2d 482, 498 (Tex.Cr.App. 1996) ("Because the weighing of "mitigating evidence" is a subjective determination undertaken by each individual juror, we decline to review that evidence for "sufficiency." We defer to the jury's conclusion that the evidence did not warrant a sentence of life imprisonment."). Unlike other errors which relate to questions of fact, given the truly unique and subjective nature of the jurors' evaluation of mitigation evidence in the context of Texas' death penalty statute, any attempt by an appellate court to determine how the individual jurors might have been affected by the evidence is purely speculative. *See and cf.*, ***Sullivan***, 508 U.S. at 281 ("A reviewing court can only engage in pure speculation --- its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant['s moral culpability]." (citation omitted)). Any harm evaluation in the context of ***Penry*** error would necessarily require second-guessing by the appellate court, substituting its own opinion for that of the jurors who were deprived of the opportunity to pass their own moral judgment upon the evidence.

IV THIS COURT'S MOST RECENT *PENRY* DECISION IN *SMITH V. TEXAS* (*SMITH II*) SUGGESTS THAT THE QUESTION OF HARM FROM *PENRY* ERROR IS SUBSUMED INTO THE QUESTION OF ERROR.

The question raised by Petitioner appears to have already been decided by this Court in ***Smith II***, a contention made by the State of Texas in its certiorari petition in ***Nelson***. *See*, ***Quarterman v. Nelson***, No. 06-1254 Petition for Writ of Certiorari, p. 30 ("the applicability of the harmless-error review is *directly at issue* in *Smith v. Texas*, No. 05-11304

and is currently pending before the Court.") (emphasis added). Mr. Garcia would suggest that ***Smith II*** addresses Petitioner's contentions in this matter, concluding that the question of harm from ***Penry*** is subsumed into the question of error in itself.

Smith II addressed the CCA's decision on remand following this Court's reversal for ***Penry*** error in ***Smith I***. *See*, ***Smith I***, 543 U.S. at 48 - 49 (holding nullification instruction did not cure underlying ***Penry*** error). On remand, the CCA subjected Smith's claim to the state harmless error standard for jury charge error set out by Tex.Code Crim.Pro. Art. 36.19.[5] Construing this Court's ***Penry I*** and ***II*** decisions to address distinct errors, the CCA concluded that Smith had not properly preserved his objection to the punishment charge, and subjected his claim to the more stringent harm analysis under the state harm standard. ***Ex parte Smith***, 185 S.W.3d 455, 463 - 464, 467 (Tex.Cr.App. 2006). The CCA concluded that Smith had not been prejudiced because he had not demonstrated "'actual harm' much less 'egregious harm'" from the ***Penry*** error. ***Smith***, 185 S.W.3d at 468 - 472.

This Court granted certiorari this time to address the CCA's applied harm standard. This Court rejected the CCA's "egregious harm" standard to the constitutional question

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[5] As explained in ***Almanza v. State***, 686 S.W.2d 157 (Tex.Cr.App. 1984), jury charge error is reviewed for harm under two categories: the "some" harm standard, which applies to preserved error, and the "egregious harm" standard, which applies to "waived" charge error. ***Id.***, at 171. The CCA has explained that following a timely objection, reversal is required "if the error is 'calculated to injure the rights of defendant' which means no more than that there must be some harm to the accused from the error." ***Ibid.*** If not objection was made, reversal will not be made unless it was "egregious" and created such harm that he "has not had a fair and impartial trial" ***Ibid.***

In ***Arline v. State***, 721 S.W.2d 348 (Tex.Cr.App. 1986), the Court explained that "the presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction. Cases involving preserved charging error will be affirmed only if no harm has occurred." ***Id.***, at 351.

before it. Instead, the Court cited with approval the CCA's previously adopted review of ***Penry*** error in which a finding of error subsumed the question of harm:

> Under Almanza, once Smith established the existence of instructional error that was preserved by a proper objection, he needed only to show he suffered "some harm" from that error. In other words relief should be granted so long as the error was not harmless. 686 S. W. 2d, at 171. It would appear this lower standard applies to Smith's preserved challenge to the special issues.
>
> The Court of Criminal Appeals explained in its recent decision in Penry v. State, 178 S. W. 3d 782 (2005), that once a state habeas petitioner establishes "a reasonable likelihood that the jury believed that it was not permitted to consider" some mitigating evidence, he has shown that the error was not harmless and therefore is grounds for reversal. Id., at 786-788 (citing Boyde v. California, 494 U. S. 370 (1990)). We note that the Court of Criminal Appeals stated in dicta in this case that even assuming Smith had established that there was a reasonable probability of error, he had not shown "'actual' harm," 185 S. W. 3d, at 468, and therefore would not even satisfy the lower Almanza standard. We must assume that this departure from the clear rule of Penry v. State resulted from the state court's confusion over our decision in Smith I.
>
> The Court of Criminal Appeals is, of course, required to defer to our finding of Penry error, which is to say our finding that Smith has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence. See Johnson v. Texas, 509 U. S. 350, 367 (1993). Accordingly, it appears **Smith is entitled to relief under the state harmless-error framework**.

Smith II, 550 U.S. ___, ___, 05-11304, slip op. at 18 (emphasis added). *See and compare*, ***Calderon v. Coleman***, 525 U.S. 141, 152 (1998) (Stevens, J., joined by Souter, Ginsberg & Breyer, dissenting) ("a fair reading of the Chief Justice's opinion for the Court in ***Boyde v. California***. . . indicates that the heightened 'reasonable likelihood' standard endorsed in that case was intended to determine whether an instructional error 'requires reversal.'"(internal

citations omitted).

This Court's approval of the CCA's harm analysis in ***Penry v. State*** 178 S. W. 3d 782, a decision which construed a finding of charge error under ***Boyde*** as *ipso facto* containing *some* harm, and therefore mandating relief, at a minimum suggests that a separate harm analysis is not a part of ***Penry***. The mere fact that jurors were precluded from giving effect to a defendant's mitigating evidence is sufficient to deprive the defendant of a fair trial because the jurors were precluded from considering and giving their moral response to evidence presented in mitigation, separate from simply rebutting the aggravating evidence at trial. This conclusion is consistent with this Court's previous ***Penry*** decisions, in particular ***Penry II***, in which this Court reversed the sentence upon a finding of error, yet subjected a separate claim to a separate harmless error review. ***Id.***, 532 U.S. at 796. Similarly, the Fifth Circuit panel's treatment of ***Penry*** error in Mr. Garcia's case, as well as the En Banc Court's treatment of the error in ***Nelson***, is consistent with this conclusion. Insofar as Petitioner has conceded that there was a reasonable likelihood that the jurors were precluded from giving full effect to all of Mr. Garcia's mitigating evidence, *Petitioner's Brief*, at 32, the basis for certiorari in this case is foreclosed by ***Smith II*** since Mr. Garcia would have experienced *some* harm from the jurors being able to give effect to his mitigation evidence.

CONCLUSION

Certiorari is plainly not warranted in the instant case. This Court has recently rejected

this precise issue in ***Nelson*** and Petitioner has offered no new reason to address this issue, or why this Court was even mistaken in its previous denial of certiorari in ***Nelson***.

Further, due to the uniqueness of the Texas death penalty statue among death penalty jurisdictions coupled with the amendment to the 1991 statute, and the declining number of Texas inmates remaining who were convicted under the statute, the issue carries no jurisprudential significance outside of a handful of Texas inmates.

Moreover, ***Penry*** error is uniquely unsuitable to a harm analysis because the error directly relates to the jurors subjective normative judgments regarding the evidence with which they were unable to give effect. This type of evaluation – in contrast to typical "trial error" is impossible to quantify. It is unnecessary for this Court to clarify this point in light of its prior ***Penry*** jurisprudence, as well as the Fifth Circuit's discussion of this point in ***Nelson***.

Finally, in light of this Court's decision in ***Smith II***, the question has been implicitly resolved against Petitioner. A finding of ***Penry*** error satisfies a showing of sufficient harm to require reversal of a death sentence because the preclusion of the jury from being able to fully consider and give effect to a defendant's mitigation evidence deprives the defendant of a fair trial at punishment through depriving the jurors of a vehicle in giving effect to his mitigating evidence which is either irrelevant to, or bears relevance beyond the scope of the statutory punishment issues.

This Court should therefore deny certiorari.

Respectfully Submitted,

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